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Supreme Court of Wisconsin.

COMSTOCK v. BECHTEL.

An insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay, or defraud his creditors ; but the property so purchased does not, for that reason, cease to be exempt. The only remedy of the creditors is by attacking the sale of the non-exempt property.

APPEAL from Circuit Court, Dane county.

Replevin for two horses, one harness, one sleigh, one wagon, and two cows, alleged to have been levied upon and seized by the defendant, who was the sheriff of Dane county, by virtue of a certain attachment, and an execution duly issued by the circuit court of that county against the property of the plaintiff, and in the hands of such sheriff for service. The plaintiff claims that the property in controversy is exempt from seizure by virtue of such writs.

In his answer the defendant justifies the seizure of the property by virtue of the aforesaid writs, and alleges that the same is not exempt from being so seized, because the plaintiff was one of a firm hopelessly insolvent, against which judgments for large amounts had been rendered, and others were about to be entered in actions then pending, and that plaintiff, for the purpose of defrauding the creditors of such insolvent firm, sold certain notes and securities owned by him, and not exempt, and with the proceeds thereof purchased the property so seized with the intention of holding it as exempt property.

The cause was tried by the court without a jury. The court found that the defendant was sheriff of Dane county, and as such, by virtue of valid process, seized the property claimed on February 1st 1884, and that at the time of such seizure the same was all the personal property which the plaintiff owned ; also that the value of the property was \$685, and that the amount for which such writs were issued exceeded that sum. The more material findings of fact are as follows : “ (5) That on the thirty-first day of December the said plaintiff was the owner of, and held in his own name, a note secured by mortgage upon real estate of the value of twelve hundred dollars (\$1200), and one note of the value of one hundred dollars (\$100). (6) That at this time the said plaintiff was heavily indebted and wholly insolvent ; that said plaintiff, although repeatedly requested by his creditors to pay his indebtedness, immediately

preceding the date of the purchase of said property, to wit, January 1st 1884, neglected so to do; that said plaintiff, at the time so requested by his creditors to pay his indebtedness, stated to his said creditors that he was unable to pay, and that he did not have or own any property or money wherewith to pay and discharge his indebtedness. (7) That said plaintiff did, on the 31st day of December 1883, dispose of and sell said notes to one Stewart Shampnor, and thereby intended to prevent and keep his creditors from levying on said note for the purpose of satisfying their claims, and that the said plaintiff, on the 1st day of January 1884, did use the funds by him raised on the sale of the notes as aforesaid, and applied said funds in payment of the purchase price of the property above described, and by him so claimed as personal exemptions, and that the said plaintiff, by said purchase of said property, intended to and did acquire the personal property exemptions by law provided, and that said plaintiff, by said immediate purchase, intended to prevent his said creditors from interfering with his said rights to acquire said personal property exemptions by means of their levying on and applying said moneys in satisfaction of their claims and demands against him."

As conclusions of law the court found "that said plaintiff is entitled to the return of said property, and to hold it as his personal property exemptions;" also that he was entitled to recover nominal damages and costs. Judgment for the plaintiff was ordered and entered accordingly. The defendant appeals.

La Follette & Siebecker, for respondent.

Rufus B. Smith, for appellant.

The opinion of the court was delivered by

LYON, J.—The circuit court found that the plaintiff sold the notes mentioned in the findings of facts with the intention of preventing a seizure thereof by his creditors; and that, with the proceeds of the notes, he purchased the property in controversy, intending thereby to acquire exempt personal property which would be beyond the reach of his creditors. That such were the intentions of the plaintiff is the inevitable conclusion from the facts of the sale of the notes and the purchase of the property, because it must be presumed that the plaintiff intended the necessary results of his acts, and it was the necessary and inevitable result of such sale and pur-

chase (if valid) that the notes, and the property purchased with the proceeds thereof, were thereby placed beyond the reach of creditors of the plaintiff. The intention of the plaintiff is, therefore, rather the subject of a conclusion of law to be deduced from the facts, than an independent fact in the case. The findings would not have been any more favorable to the plaintiff had nothing been said therein concerning his intentions; and for like reasons they would not be any less favorable to him had the court found expressly that such sale and purchase were made by the plaintiff with intent to hinder, delay, or defraud his creditors. That also is the subject-matter of a deduction from the facts.

The material facts are, therefore, that the plaintiff was wholly insolvent; that he owned two notes which were liable to be reached by his creditors; and that he sold such notes, and, with the proceeds, immediately purchased the property in controversy. From these facts the intention of the plaintiff to place his property beyond the reach of legal process must be presumed. The precise question to be determined is, therefore, is property which under the statute (Rev. St. 781, sec. 2982, § 6) is ordinarily exempt from seizure on attachment or execution liable to such seizure if the debtor is insolvent, and has purchased the property with the proceeds of other property, not exempt, with the intention of holding the property so purchased as exempt, and thus preventing his creditors from collecting their debts out of his property? The question now arises for the first time in this court.

The creditors whom the defendant (the sheriff) represents do not attack the validity of the sale of the notes by the plaintiff, or the purchase by him of the property in controversy. On the contrary, their theory necessarily is that both the sale and purchase are legal transactions,—the sale divesting the plaintiff of all title to the notes, and the purchase vesting in him a good title to the property thus acquired. But they maintain that because the notes might have been reached by legal process while the insolvent debtor owned them, it ought to be held that no right of exemption to the property purchased with the proceeds of the notes ought to be upheld. Several cases are cited by counsel for defendant to this proposition, and it is doubtless sustained by some of them, particularly by *Riddell v. Shirley*, 5 Cal. 488; *Emerson v. Smith*, 51 Penn. St. 90; *Brackett v. Watkins*, 21 Wend. 68; *Grimes v. Bryne*, 2 Minn. 104 (Gil. 72); *In re Wright*, 3 Biss. 359; *Pratt v. Burr*, 5 Id.

36. It is understood, however, that the opposite doctrine now prevails in California and New York. See *Randall v. Buffington*, 10 Cal. 491; *Wilcox v. Hawley*, 31 N. Y. 648.

We think it must be conceded that there are very serious objections to the doctrine which the cases first above cited (and perhaps others) seem to assert. In the first place, it interpolates a qualification or limitation in the statute of exemptions not written therein by the legislature. The statute exempts the specific property therein mentioned absolutely and unconditionally. The rule of these cases is that it shall not be exempt at all if purchased by an insolvent debtor with the proceeds of non-exempt property. This court has steadily held that it has no authority to make such interpolations: *Harrington v. Smith*, 28 Wis. 43; *Chase v. Whiting*, 30 Id. 544.

Counsel for the defendants seeks to avoid the force of this principle by saying that courts do, by construction, sometimes ingraft exceptions upon statutes, and he refers, as an illustration, to the line of cases which hold that the contributory negligence of the injured party will defeat a recovery in an action against a town to recover damages for an injury alleged to have been caused by a defective highway, whereas the statute giving the right of action contains no such qualification of the right. The cases are not parallel. The statute gives a right of action only when the injury is caused by the insufficiency of the highway. The courts merely hold that the injury is not so caused if the negligence of the injured party contributes proximately to it. These are cases of authorized construction of the words of a statute. In this case we are asked to ingraft a limitation upon a statute when there is not a line or a word therein which will justify it.

Again, the doctrine under consideration rests upon the ground that exemption is merely a personal privilege of the debtor which the courts may lawfully adjudge forfeited for his fraud and dishonesty. This is too narrow a view. Our exemption laws were enacted in obedience to the mandate of the constitution: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognised by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." Art. 1, § 17.

This mandate and these laws are grounded in the soundest considerations of public policy, in that they are designed to secure not

only to the debtor, but to his family, the necessary comforts of life, as against his creditors; thus protecting and guarding the highest interests both of the individual citizen and of the family, the benefits of which to the state can scarcely be overrated. In *Maxwell v. Reed*, 7 Wis. 582, Mr. Justice SMITH spoke of the exemption laws as "one of the great bulwarks of individual freedom and manly citizenship so carefully guarded by the fundamental law." In dealing with the exemption laws this court has steadily kept these considerations in view, and has rejected every construction of them which would tend to defeat the beneficent purposes for which they were enacted. It has always given them a liberal construction in favor of the exemption, and in the case last cited, it held that a stipulation in a note, waiving the benefit of such laws in respect to the indebtedness thereby created, was inoperative and void because opposed to a sound public policy. The principles upon which this court has uniformly thus acted seem to be disregarded in the cases which hold that in a case like this the right of exemption is forfeited.

Moreover, the rule of these cases would deprive insolvent debtors of the right to acquire any exempt property with the proceeds of property not exempt. An insolvent debtor may have \$50 in his pocket. While he retains the money his creditors may reach it by legal process. Under the rule above mentioned, if he should purchase a cow with the money, no matter how sorely he and his family may need the cow, the creditor may seize and sell her upon execution. And this, not because it was a fraud on the creditor for the debtor to purchase the cow with his own money, but because such a use of the money operated in some mysterious way to repeal the exemption laws in respect to that particular cow.

For the reason above suggested we cannot approve the doctrine of the cases relied upon by the defendant to defeat the plaintiff's right of exemption in the property in controversy. The true rule is if the plaintiff made a fraudulent sale of the notes his creditors may reach them in the hands of the fraudulent purchaser, collect or sell them, and apply the proceeds on their demands. That is their only remedy against the fraud, and the sale of the notes is the only fraud in the transaction. The purchase by the plaintiff of exempt property with the proceeds of the notes was a legal transaction, containing no element of fraud. The absolute title to the property so purchased vested in the plaintiff, one of the incidents

of which was the right under the exemption laws to hold it against his creditors.

The foregoing views are sustained by a large number of cases cited by counsel for plaintiff. We are satisfied that these cases lay down the correct rules of law applicable to this case. It follows that the plaintiff is entitled to hold the property claimed exempt from seizure, and hence that the case was correctly decided by the circuit court.

Judgment affirmed.

In 1857, it was held by Mr. Justice MILLER, in *Pratt v. Burr*, 5 Biss. 36 (U. S. Ct. for Dist. of Wisconsin), that where the defendant purchased goods of the plaintiff with which to replenish a stock which he afterwards sold, and purchased exempt property with the proceeds, the exemption in such case could not be sustained. "The mere statement of the facts," said the learned judge, "decides this case, in the conscience of every man, that neither in law nor justice the exemption should be allowed. The defendant cannot expect the court to assist him in consummating the intended fraud. A party cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud."

In *Riddell v. Shirley*, 5 Cal. 488, an insolvent debtor sold certain personal property to the plaintiffs for the purpose of raising money with which to discharge debts which were a lien upon his homestead. A creditor attached the goods, and the plaintiff brought replevin for them. HEYDENFELDT, J., said: "Although the law secures the homestead from execution arising from ordinary indebtedness, it is yet made chargeable for debts by the act of the parties interested in its preservation, and in some instances by operation of law. Where such cases exist, it would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved intentionally, by the disposition of all the other property of

the debtor, leaving nothing for the satisfaction of the other creditors. Such a sale, except to a creditor, in payment of his debt, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. It is a sale with the direct intent of benefit or advantage to the seller, to the injury of the creditor." See *Re Wright*, 3 Biss. 359.

In *Randall v. Buffington*, 10 Cal. 491, CH. J. FIELD said: "For the disposition of this case, we shall assume the fact that his insolvency was established, and, upon this assumption, it is difficult to perceive how the payment of a debt which he legally owed, and which was past due, can be tortured into an act to hinder, delay and defraud creditors. The debt was as sacred as any other debt, the obligation to pay it was as binding, and, even if the payment constituted a preference, there is no rule of law which prevents a debtor, in insolvent circumstances, from the application of his property to the payment of one debt rather than another: *Dana v. Stanfords*, 10 Cal. 269; *Nicolson v. Leavitt*, 4 Sand. 252; *Covanhoven v. Hart*, 21 Penn. St. 495; *Worland v. Kimberlin*, 6 B. Mon. 608; *Kennaird v. Adams*, 11 Id. 102.

"But, it is urged with apparent confidence in the conclusive character of the position, that the payment resulted to the benefit of the defendant, as it relieved his homestead of the encumbrance, and, consequently, of liability of being sold for its satisfaction. We confess our inability to see what difference

this can make in the transaction. The obligation to pay the debt was not the loos binding because it was secured by mortgage; and, if a lien was removed from the homestead, it was the consequence of an act lawful in itself. The payment conferred upon the debtor no new right. He owned the homestead free from liability before the debt of the plaintiff was contracted, and he simply restored its former exemption by paying a debt which he had incurred upon its security.

"The case of *Riddell v. Shirley*, 5 Cal. 488, is a very different one from this. In that case there was a fraudulent and collusive sale of the debtor's property to discharge liens upon his homestead; the vendee was not a creditor receiving payment of a debt, and no claim against the homestead was asserted. The opinion expressly excepts from its conclusion a case like the present. 'To make this case,' very justly observes the learned counsel for the respondent in his brief, 'at all like *Riddell v. Shirley*, the plaintiff ought to sue Drew to get the money back which the defendant paid him; but the absurdity of such a proceeding is too apparent to need any comment.'"

Notwithstanding the remarks of the learned judge, the case seems to overrule *Riddell v. Shirley*. See Thompson on Homesteads and Exemptions, sect. 306.

In Illinois it is held not to be a fraud for an insolvent debtor to purchase a homestead, even though he cause the title to be vested in his wife, if he in good faith intended it as a homestead: *Cipperly v. Rhodes*, 53 Ill. 346. BREESE, C. J., said: "No question is made that the homestead right would have existed in Rhodes, had he taken the deed to the lot in his own name instead of taking it in the name of his wife. He paid the purchase-money wholly out of his own funds, and at a time he had a right to obtain a homestead which would not be liable for his debts then existing, or to be subsequently contracted; and the sole

question is whether taking the deed to his wife placed the property beyond the protection of the homestead law. This is an inquiry into which the *animus* enters largely. Did he purchase it as and for a homestead, and has it been so used and held. If such was his intention, then taking the deed to his wife would not, we think, cut off that right. If the design was simply to acquire property, which he could hold in fraud of his creditors, then the law would strip it of its covering, and subject it to the payment of the debts. But it must be remembered that it was not a fraud on his creditors to buy a homestead which would be beyond their reach."

Following *Randall v. Buffington*, it was held that an insolvent debtor might appropriate land to the use of a homestead even after a judgment was obtained against him, but before it became a lien upon the land: *Culver v. Rogers*, 28 Cal. 520. In *In re Henkel*, 2 Sawyer 307, the United States District Court held that under the law of California an insolvent might apply funds in his possession to the discharge of an encumbrance on his homestead without impairing its inviolability, and that a homestead might be declared at any time before the lien of a judgment had actually attached.

In Nevada, property which possesses the characteristics of a homestead may be selected at any time before actual sale or execution, and the right of such selection is not destroyed by the insolvency of a debtor or the levy of an attachment: *Hawthorne v. Smith*, 3 Nev. 182. See further on this point Thompson on Homesteads and Exemptions 319; *Trotter v. Dobbs*, 38 Miss. 198; *Irwin v. Lewis*, 50 Id. 363; *Letchford v. Cary*, 52 Id. 791; *Stone v. Darnell*, 20 Tex. 11; *Giddings v. Crosby*, 24 Id. 295; *Macmanus v. Campbell*, 37 Id. 267; *North v. Shearn*, 15 Id. 174.

In *Edmondson v. Meacham*, 50 Miss. 34, the rule is stated to be as follows: "A debtor may innocently subtract

from his resources such means as may be reasonably necessary for the support of his family. His creditors, therefore, cannot pursue and reach the money of the husband and father paid for such necessary purposes, as the maintenance of the family and education of the children. But subject to that right, the debtor must devote his property and means to his creditors. If the husband takes money which ought to pay his debts and invests in the purchase of real estate or other

property for wife or children, the transaction may be fraudulent or not, as the husband may be indebted or not, and then by a comparison of his debts with the resources retained by him. If he was insolvent at the time of the purchase, the evidence is overwhelming and conclusive that the motive was to make a gift at the expense of creditors, and that the intent was to withdraw his means from their reach."

CHARLES BURKE ELLIOTT.

Minneapolis.

Supreme Court of Michigan.

LLOYD v. WAYNE CIRCUIT JUDGE.

A statute which provides for the *ante mortem* probate of a will is inoperative and void.

A proceeding authorized by such statute by which questions as to competency, undue influence, &c., can be determined in advance of the testator's death, is not within any recognised judicial power, and the courts cannot be called upon to enforce it.

MANDAMUS.

John H. Bissell, for relator.

The opinion of the court was delivered by

CAMPBELL, J.—In this case Lloyd attempted to have his will established during life in the Probate Court for Wayne county, and an appeal was taken from the Probate to the Circuit Court. In that court the circuit judge was of opinion that the proceeding was extra-judicial, and refused to allow it to go on; but instead of dismissing or quashing it on that ground, entered an order affirming the probate decree. *Mandamus* is now applied to vacate that order.

There can be no doubt of the impropriety of the order of the Circuit Court. By affirming the probate order he asserted jurisdiction, and he had no right to affirm it without a hearing on the merits. But whether he should proceed to such a hearing is the principal question before us. The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living